IN THE

# Supreme Court of the United States

OCTOBER TERM 1945.

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No.

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JOSEPH MERANDO, trading as Merando Company, *Petitioner*,

v.

JOSEPH MATHY and JOHN MATHY, Co-partners, trading as the Mathy Company, *Respondents*.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### STATEMENT OF THE CASE.

A general statement of the case has been given under the heading "C" in the Petition for Writ of Certiorari and further facts will be referred to in the argument which follows.

### II.

### SPECIFICATION OF ERRORS.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the petitioner offered no proof at the trial that respondents' man stopped his men from working.

2. In totally ignoring the fact that before stopping work the respondents assigned one reason for refusing to perform their sub-contract, and then after suit was filed, changed their ground and attempted to put their refusal upon a different consideration.

3. In holding that under the terms of the sub-contract the petitioner did not have the right to terminate the same, in the event it was not being performed to his satisfaction.

4. In holding, by affirming the judgment, that the judgment could include anticipated profits based upon information furnished by respondents' counsel to the trial justice, after the trial was over, and which was not offered in evidence.

## III.

## ARGUMENT.

### Point I.

**The court erred in holding the petitioner offered no proof at the trial that respondents' man stopped his men from working.**

In the court below the petitioner contended that it was the respondents' foreman Curtin who forced his employees to cease cutting and otherwise making ready for the plumbers who were the respondents' employees. As to this contention the court below stated in part as follows: "The defendant offered no proof at the trial which would permit a finding that plaintiffs' man, either by word or deed, set up any real bar against the defendant in proceeding with the cutting work" (Rec. 363).

At no time, except in the opinion of the court below has there been any dispute concerning the fact that the respondents did stop the petitioner's men from working on August 10, 1943. As a few examples of the evidence on this point we call attention to testimony of one of the respondents' witnesses, who had been in the employ of the

petitioner. Mr. McKay, one of the petitioner's employees, testified that he was ready to take the panels out but "He (respondents' foreman) stopped us from doing it" (Rec. 130). In reporting to petitioner, this same witness stated in part "I have arranged for myself and Andy Glow to take out the wooden panels wherever needed so the plumbers could work, but Curtin (respondents' foreman) is going to delay the job if I go through with it" (Rec. 324). He further testified he was ready on August 10 with his men to proceed as he had been doing, but Curtin, respondents' foreman, interfered and wouldn't let him do it (Rec. 131).

But aside from the foregoing, we have only to look to the findings of fact by the trial court, which we understand are binding on the appellate court, to substantiate the petitioner's contention. The 17th finding states in part as follows: ". . . plaintiffs' foreman stopped the maintenance men from doing further cutting (August 10) . . ." (Rec. 21).

Counsel for respondents have never advanced the claim that the respondents' foreman did not stop the petitioner's men from working, on the contrary they admitted that fact in their brief, as it stated on page 22 that on August 10 Curtin advised " . . . the maintenance men they would have to cease cutting. . . ."

With reference to any possible conflict of labor classification that may have developed the sub-contract provided as follows:

> "1. In all instances you will furnish, and pay for, all materials, necessary equipment and/or labor to perform the required work with thoroughly experienced workmen of such classification as will be acceptable to MERANDO COMPANY, their clients and any others associated with them in work of which this order is a part. In accepting this order, you waive any and all claims for damages or additional payment because of conflict of labor classification." (Rec. 317.)

We respectfully submit that the record does support the petitioner's contention in this respect, and that the act of

the respondents in stopping the petitioner's men from working constituted a breach by respondents and the lower court should have so held.

## Point II.

**The court erred in totally ignoring the fact that before stopping work the respondents assigned one reason for refusing to perform their sub-contract, and then after suit was filed, changed their ground and attempted to put their refusal upon a different ground.**

The respondent's complaint alleged in part that on or about August 12, 1943, they were compelled to notify the petitioner that unless certain cutting work "—was promptly done, *or* the plaintiffs authorized to do same at defendant's expense, they would have to discontinue their work—" (Italics supplied). They further allege that on August 16, 1943, their work had reached a stage where they could proceed no further until said cutting was done and so advised the petitioner, who "—instead of carrying out his obligation to do said cutting—," notified respondents on August 17, 1943, their sub-contract was terminated (Rec. 2 and 3).

The evidence presented at the trial of the case showed that the respondents stopped work, not on the 16th of August, but on the 13th, and it was their contention at the trial that the reason they stopped work on August 13th was due to the fact that through failure of the petitioner to perform his part of the contract there was no work for them to perform (Rec. 77-78).

There was also presented in evidence at the trial a letter from the respondents to the petitioner dated August 12th, 1943, concluding as follows:

> "You will please forward at once to our superintendent, Mr. William J. Curtin, Room 1211, Hotel Keystone, Boulevard of the Allies & Wood Street, Pittsburgh, Pa., a written order, properly signed, authorizing *us* to do this cutting for you.
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> *"Only under these conditions can we continue our work on the job."* (Italics supplied) (Rec. 331).

This letter was received by the petitioner on August 13th, the *same* day on which the respondents stopped all their work.

It will be seen from the foregoing that while the complaint stated that the respondents notified the petitioner, on August 12, 1943, that unless *he* did the cutting promptly *or* authorized them to do it at his expense, they would have to discontinue their work, the letter itself shows the petitioner was given no such choice, as the letter clearly states, without ambiguity, the *only* condition upon which they would continue their work, namely, *either the petitioner give them a written order authorizing them to do the cutting or they would stop.*

It is only fair to assume that they meant what they wrote, and the reason they did stop work was because the petitioner had not given them a written order authorizing *them* to do the cutting.

This phase of the case was totally ignored by the trial court and appellate court.

This Court in the case of *Railway Co.* v. *McCarthy,* 96 U. S. 258, stated the law as follows:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

We respectfully submit that aside from the fact there was nothing in the subcontract that gave the respondents the right to demand that *they* do the cutting, they having, before litigation given their reason for refusing to continue their work, can not after litigation has begun, change their ground, and claim it was because there was no work for them to perform.

## Point III.

**The court erred in holding that under the terms of the subcontract the petitioner did not have the right to terminate the same, in the event it was not being performed to his satisfaction.**

Paragraph two of the terms and conditions of the subcontract provided as follows:

> "2. You will prosecute the work diligently, with trained organization under proper supervision, and with proper equipment. Should the workmanship or time consumed in manufacture and/or installation, *in our opinion,* be unsatisfactory or contradictory to this order, we reserve the right to terminate this agreement upon three (3) days written notice to you. Upon said termination we shall have the right to withhold all funds due on this order and to deduct from said funds the cost of satisfactorily completing the work specified. Should the cost of such satisfactory completion exceed the balance due you on this order, then you shall be liable to us for the full amount of such excess, together with damages sustained by us by reason of the delay." (Italics supplied) (Rec. 317.)

On August 17th the petitioner being dissatisfied with the performance of the sub-contract by the respondents wrote them as follows:

> "In view of the fact that you have failed to satisfactorily perform your above subcontract, please be notified that in accordance to paragraph #2 of said contract we hereby terminate said agreement to take effect within three (3) days from the receipt of this letter.
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> We shall hold you responsible for any loss we may sustain in the matter." (Rec. 336.)

The parties having agreed in advance to leave to the petitioner the right to decide whether or not the workmanship and the time consumed was satisfactory, they were bound thereby and the lower Court should have held as a matter of law that the petitioner did have the right to

terminate the contract and hold the respondents liable for any loss he sustained.

In the case of *United States* v. *Gleason*, 171 U. S. 588, which involved a contract, there was a provision therein which provided in part that in the event the contractor should fail, *in the opinion of the engineer in charge*, to prosecute the work faithfully and diligently, the contract could be annulled by giving written notice. This Court in construing the contract stated in part as follows:

> "Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.
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> * * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the *result of their own fault or of forces beyond their control* * * *." (Italics added.)

In the case of *Goltra* v. *Weeks*, 271 U. S. 536, which involved a lease there was a provision which gave the Secretary of War the right to terminate the lease if *in his judgment* there was a non-compliance. This Court stated as follows with reference to the right to terminate the lease.

> "The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. * * * Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into."

There was no finding by the lower Court that the petitioner was guilty of any fraud or bad faith, nor does the

evidence disclose any. That the respondents were behind with their work is beyond dispute. They were twenty days late in starting and on July 27-28 the Government inspection showed the work 25% completed when 50% was normal (Rec. 319). While there *may* have been a dispute as to whether there was *any* work for the respondents to perform after August 13th, that is the very reason the provision was inserted, as was stated by the Supreme Court in *United States* v. *Gleason, supra,* "Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail."

On this point the Court below stated in part as follows: "It is perhaps sufficient to point out that the right to terminate embodied in the contract, was extinguished by prior termination through breach." (Rec. 364). But it must be remembered that in a sense, every dispute resolves about a breach of contract, for any claim under the contract, and its denial, is predicated upon the contention that the contract does or does not require the action sought or refused. And in order to determine the question of breach it is frequently necessary to interpret the rights and obligations created by the contract and specifications, a function which this Court has recognized may be entrusted to administrative disposition. *United States* v. *McShain,* 308 U. S. 512, 520; *Plumley* v. *United States,* 226 U. S. 545, 547; *Ripley* v. *United States,* 223 U. S. 695, 704; *Sweeney* v. *United States,* 109 U. S. 618, 620.

We respectfully submit that the parties having agreed that the petitioner would have the right to terminate the contract in the event it was not being performed to his satisfaction, the lower Court should have held as matter of law that he had the legal right to terminate the same.

## Point IV.

**The court erred in holding, by affirming the judgment, that the judgment could include anticipated profits based upon information furnished by respondents' counsel to the trial judge, after the trial was over, and which was not offered in evidence.**

The respondents' original Bill of Particulars (which is not in the record) claimed anticipated profits of $2,275.24. Their amended Bill of Particulars claimed anticipated profits of $1,956.63 (Rec. 14). After the trial was over the respondents submitted their suggested findings of fact and had attached thereto a document entitled "Plaintiffs' Profit" (Rec. 26, 27 and 28) setting forth profits of $1,423.43, which was the amount allowed by the trial court as anticipated profits (Rec. 23). It will be noted that the statement entitled "Plaintiffs' Profits" contains many items which were not included in the Amended Bill of Particulars, and contains information that was not introduced in evidence.

The evidence in the case was that at the time the respondents stopped work they had spent $1,561.00 for plumbers' wages (Rec. 304), material $1,411.15, supervision, insurance, taxes and miscellaneous $579.21 (Rec. 14) a total of $3,551.36, and using the lower court's percentage of 36% completion, if they had completed 36% of the work at a cost of $3,551.36 it would have cost them $9,864.00 to do all the work. Their contract price was $10,500.00, so even at that percentage they would only have made a profit of $636.00. We believe it only fair to call the Court's attention to the fact that based upon the evidence contained in the government's report, the work was only 30% completed, which would have shown a loss to the respondents of $1,339.00.

We respectfully submit that it was error to allow anticipated profits based upon information that was not offered in evidence.

## CONCLUSION.

For the reasons stated and on the authorities cited we submit that the writ of certiorari should be granted and that the judgment should be reversed.

Respectfully submitted,

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